CHONG NYUK FUNG & ANOR

v.

LOI LUNG KIONG & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RICHARD MALANJUM J
[SUIT NO: K22-13 OF 1997]
11 APRIL 1998

CIVIL PROCEDURE: *Pleadings - Striking out - Triable issues - Whether action bound to fail - Whether plain and obvious case for striking out - Rules of the High Court 1980, O. 18 r. 19*

CONTRACT: *Parties - Privity - Defendants not parties to contract - Sued for breach of contract - Whether action improper - Whether plaintiffs had no locus to sue - Whether action sustainable*

CONTRACT: *Terms - Implied term - Construction - Whether implied term could be read into contract - Principles - Business efficacy test - Whether term so obviously intended to be included*

CONTRACT: *Oral agreement - Construction - Oral agreement prior to execution of written agreement - Whether could be considered in construing written agreement - Whether to be excluded*

COMPANY LAW: *Separate legal entity - Lifting veil of incorporation - Principles - Whether corporate entity used to commit fraud - Whether lifting of veil warranted by facts and circumstances of case*

Goodwill Prosperity Sdn Bhd ('the 4th defendant') had signed a shares agreement for the purchase of the entire share holding of Dapu Raya Sdn Bhd ('Dapu Raya') from the plaintiffs. Dapu Raya at the material time was the assignee for some 30,000 acres of timber land in Keningau, Sabah. Thereafter, a supplementary agreement was executed by the 4th defendant and the plaintiffs, whereby they increased the consideration payable to the plaintiffs from RM7.5 million to RM12.3 million. Subsequently, due to further differences, a deed of settlement was also executed by the parties ('the deed').

Clause 3 (a) & (d) of the deed provided that the 4th defendant need not pay the settlement price under cl. 1(c), (d) and (e) should the plaintiffs fail to obtain the Temporary Occupiers Licence ('TOL') for 8000 acres of the timber land in question. Although payment was made by the 4th defendant as agreed under the deed, apparently, there was still a balance of RM3,423,994.59 outstanding. The plaintiffs filed an action against the 4th defendant and the other defendants herein claiming the balance sum allegedly owing under the agreement.

The defendants applied under O. 18 r. 19 Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court to strike out the plaintiffs' action on the grounds that (1) the action was based on the deed, and was therefore misleading as the other defendants were not parties to the deed; (2) the TOL for the 8000 acres of timber land was not obtained, and that being so the action against the 4th defendant was unsustainable by reason of cl. 3(a) & (d) of the deed; and (3) the plaintiffs had no standing to bring an action for losses suffered by the 4th defendant.

The plaintiffs alleged that there was an oral agreement in the course of the negotiations that the liability of the 4th defendant would be guaranteed by the other defendants, in particular by the 1st defendant. The plaintiffs also averred that the corporate veil of some of the defendants, including the 3rd and 4th defendants, ought to be lifted, as the 1st defendant had full control over them and had conspired with them to deprive the plaintiffs of payment from the 4th defendant. Further, corporate veil, according to the plaintiffs, ought to be lifted as the other defendants had conspired among themselves to dissipate the assets of the 4th defendant to the prejudice of the plaintiffs. The issues that arose were: (i) whether the plaintiffs' action was plainly unsustainable and ought to be struck out; (ii) whether corporate veil of the relevant defendants, in the circumstances, ought to be lifted; (iii) whether implied terms could be interpreted into clause 3 of the deed.

Held:

[1] The discretionary powers to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the court is a drastic power which should be exercised in plain and obvious cases: (*Tractors (M) Sdn Bhd v. Tio Chee Hing*). When a question of law becomes an issue, this itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question: *(Bank Negara Malaysia v. Mohd Ismail & Ors).*

[1a] There was no triable issue which warranted the claim against the defendants to proceed. There could not be found any allegation of fact being complex as the primary object of the plaintiffs was for payment of the balance sum allegedly due under the deed. The legal issues raised were unarguable and unsustainable, and thus, to allow the claim to proceed for trial would be an exercise in futility.

[2] Matters covered in the course of a negotiation are generally to be excluded in the construction of a written contract. The evidence to be considered should be restricted to the evidence of the factual background known to the parties at or before the date of the contract. The court would thus be precluded from considering the alleged oral agreement.

[3] The court would not exercise its discretion to lift the corporate veil as this was not a case where the 4th defendant was just a facade or a mask of the other defendants in order to secure an undue advantage over the plaintiffs. If there was any understanding that the liability of the 4th defendant would be guaranteed or undertaken by any of the other defendants, the deed was clearly silent. There was no documentary proof submitted to indicate the existence of such an undertaking.

[4] Only a person who is a party to a contract can sue on it. The law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property as under a trust but it cannot be conferred on a stranger to a contract as a right to enforce the contract is personam.

[4a] There was no dispute that none of the other defendants was a party to the deed, the sales of shares agreement or the Supplementary Agreement. The primary object of the present action was to secure the balance of the sum allegedly due under the deed. There was thus no basis for the other defendants to have been made partners to the action, they not being privy to the deed. The proper party to demand payment from should be the other party to the deed, namely the 4th defendant.

[5] Parties to a contract are taken to have incorporated therein all terms and conditions which they wanted. A term cannot be implied unless the parties must necessarily have intended it such that both would have answered 'oh, of course,' to an officious bystander had he suggested it in negotiation. For a term to be implied in a contract, it must be both necessary to give business efficacy to the contract and obvious.

[5a] In the present case, cl. 3(a) & (d) of the deed offered no room for alternate meanings to them. Neither did they indicate the necessity for implied terms to be added to give business efficacy so as to justify the 'oh, of course' test. The clause provided in clear language that the task of getting the TOL fell squarely upon the plaintiffs. There was no need for implied terms to be read into cls. 3(a) & (d) of the deed. The assertion of breach of implied terms had no basis and no triable issue could be found thereof.

[Defendants' application allowed.]

Case(s) referred to:

Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Bhd & Anor [1987] 2 CLJ 377 ***(refd)***
Bank Bumiputra Malaysia Bhd v. Majlis Amanah Rakyat [1979] 1 MLJ 23 ***(refd)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1996] 1 CLJ 625 ***(cited)***
Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 ***(cit)***
Drummond-Jackson v. British Medical Association [1970] 1 All ER 1094 ***(cited)***
Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1914-15] All ER 333 ***(refd)***
Emar Sdn Bhd v. Aidigi Sdn Bhd SC [1992] 2 MLJ 734 ***(refd)***
Gilford Motor Co Ltd v. Horne [1933] Ch 935
Golden Century Development Sdn Bhd v. Gan Hoe [1982] 1 CLJ 536 ***(cit)***
Jones v. Lipman [1962] 1 WLR 832 ***(refd)***
Kam Mah Theatre Sdn Bhd v. Tan Loy Soon [1994] 1 BLJ 9 ***(cit)***
Lee Nyen Choi v. Voon Noon [1979] 2 MLJ 28 ***(refd)***
Pengiran Othman Shah Pengiran Mohd Yusoff v. Karambunai Resorts Sdn Bhd [1996] 1 CLJ 257 ***(refd)***
Prenn v. Simmonds [1971] 3 All ER 237 ***(refd)***
Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life and General Insurance Bhd [1993] 3 CLJ 606 ***(refd)***
Salomon v. Salomon & Co Ltd [1897] AC 22 ***(refd)***
Shell UK v. Lostock [1976] 1 WLR 1187 ***(refd)***
Shirlaw v. Southern Foundries (1928) Ltd [1938] 2 KB 227 ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd [1996] 1 CLJ 529 ***(refd)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 ***(cit)***
Tio Chee Hing & Ors v. Government of Sabah [1981] 1 CLJ 23 ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 PC ***(cit)***
Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd [1993] 3 CLJ 188 ***(refd)***
Yong Ung Kai v. Enting [1965] 2 MLJ 98 ***(refd)***
Wong Hon Leong, David v. Noorazman Adnan [1995] 4 CLJ 155 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 304(1), (2)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiffs - Raymond Seetu; M/s Szetu & Assoc
For the defendants - Sugumar Balakrisnan; M/s Sugumar & Co

Reported by Michele Saw & WA Sharif

JUDGMENT

Richard Malanjum J:

The Application

The matter before me is an application by the defendants to strike out the action of the plaintiffs pursuant to O. 18 Rule 19 items (a), (b) and (d) thereof, of the Rules of the High Court 1980 ('RHC') and/or the inherent jurisdiction of the court. It is supported by the following affidavits, namely:

(i) the affidavit of Loi Lung Kiong affirmed on 22 March 1997 ("defendants' 1st affidavit");

(ii) further affidavit of Loi Lung Kiong affirmed on 17 April 97 ("defendants' 2nd affidavit");

(iii) corrective affidavit of Sugumar Balakrishnan affirmed on 17 April 1997 ("defendants' corrective affidavit"); and

(iv) affidavit in reply of Loi Lung Kiong affirmed on 26 May 1997 ("defendants' affidavit in reply").

The plaintiffs are opposing the application and have filed the following affidavits:

(a) affidavit in opposition of Chong Nyuk Fung affirmed on 28 March 1997 ("plaintiffs' 1st affidavit");

(b) supplementary and corrective affidavit of Raymond Szetu Mei Thong affirmed on 4 April 1997 ("plaintiffs' 2nd affidavit");

(c) further affidavit of Chong Nyuk Fung affirmed on 30 April 1997 ("plaintiffs' 3rd affidavit"); and

(d) affidavit of Chong Nyuk Fung affirmed on 2 May 1997 ("plaintiffs' 4th affidavit").

The application of the defendants is in two parts, namely, the first part by the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th and 9th defendants whilst the second part is by the 4th defendant only.

Relevant Undisputed Facts

By a letter dated 15 August 1991 signed by the Setiausaha Hasil Bumi, Jabatan Ketua Menteri, Sabah, approval was granted to Jadi Sabah Sdn. Bhd. to extract timber in the State Land/Forest Reserve of Pensiangan, Keningau, up to an area of 30,000 acres. Pursuant to a board of directors resolution made on 24 September 1991 it was resolved to assign and transfer "in full all values of properties" of Jadi Sabah Sdn. Bhd. to Dapu Raya Sdn. Bhd. In turn Dapu Raya Sdn. Bhd. accepted the assignment and transfer by its board of directors resolution made on 30 September 1991. On 27 September 1991 Jadi Sabah Sdn. Bhd. informed the Setiausaha Hasil Bumi of its agreement to transfer the approved timber area to Dapu Raya Sdn. Bhd. These two companies were in fact controlled by the same parties, in particular, the 1st plaintiff. And by a letter dated 11 October 1991 the Setiausaha Hasil Bumi informed Messrs Johnson TS Tan & Co to liaise with the director of Forestry Department regarding the transfer and assignment of the timber area of Jadi Sabah Sdn. Bhd. to Dapu Raya Sdn. Bhd. That ends the first part of the event.

By a sale of shares agreement dated 8 December 1993 ('the sales of shares agreement') the 1st and 2nd plaintiffs, being the registered and/or beneficial owners of the 1,000,000 ordinary shares of Dapu Raya Sdn. Bhd. sold all their shares to Goodwill Prosperity Sdn. Bhd. for the sum of RM7.5 million. The sum of RM1.2 million was paid upon the execution of the document whilst the balance of RM6.3 million was payable upon obtaining a timber extraction licence for the timber area approved earlier to Jadi Sabah Sdn. Bhd. which was subsequently assigned and transferred to Dapu Raya Sdn. Bhd. Further, the total area was also increased to 35,000 acres ('the said timber concession'). For all intents and purposes the transaction was *de facto* a sale of the said timber concession.

Subsequently, the parties to the sale of shares agreement executed a supplementary agreement ('supplementary agreement') which in effect increased the consideration payable to the vendors (the 1st and 2nd plaintiffs) to the sum of RM12,300,000 payable as follows:

(i) the sum of RM6.3 million upon the issuance of a timber extraction licence for the said timber concession;

(ii) the sum of RM1.5 million within 1½ months from the first payment; and

(iii) the sum of RM3.3 million on progressive payments by way of deducting RM30 per ton on the timber extracted from the said timber concession until full settlement.

It was also a term that in the event of the purchaser, Goodwill Prosperity Sdn. Bhd., requiring the vendors (the 1st and 2nd plaintiffs) "to remain as shareholders as their nominees, the purchaser shall secure the execution of a guarantee and indemnity by Mr. Loi Lung Kiong guaranteeing the payment of RM3.3 million to the vendors and to indemnify the vendors against any taxes that may arise from this sale of shares and the operation and sale of timber by the company" (Dapu Raya Sdn. Bhd.). And in fact a personal guarantee and indemnity dated 8 December 1993 was executed by Mr. Loi Lung Kiong in favour of the 1st and 2nd plaintiffs guaranteeing the payment on demand the sum of RM3.3 million payable as per cl. 2 (2.2)(b)(iii) of the supplementary agreement.

Thereafter a sum of RM5,249,500 less commission of RM500 was paid to the plaintiffs on 30 December 1993. A further sum of RM1,070,500 was paid on 10 January 1994.

Unfortunately, matters were not settled. There were differences between the parties which culminated in the execution of a deed of settlement dated 18 October 1994 ('the deed'). And it may be appropriate and for the sake of clarity to reproduce the relevant portions of the deed, namely:

(a) the relevant recitals:-

AND WHEREAS the First Party alleged that they have an interest in 5,000 of the 35,000 acres of timber land in the said company, which the Second Party disputes.

AND WHEREAS the Parties hereto have agreed to enter this Deed in full and final settlement of all the disputes howsoever arising on the terms and conditions hereinafter provided.

NOW THIS AGREEMENT WITNESSETH as follows:-

1. In consideration of the First Party discontinuing desisting and or refraining from making any claim against the Second Party in respect of the said Sale of Shares Agreement and the Supplementary Agreement whatsoever and the consent to the various financial deductions with the various companies hereinafter provided and in the manner hereinafter set out, the Second Party agrees to pay the sum of RINGGIT MALAYSIA SIX MILLION AND FIVE HUNDRED THOUSAND ONLY (RM6,500,000.00) in full settlement all matters and claims arising therefrom (hereinafter referred to as "the settlement sum") and shall be paid to the First Party through Messrs Alex Pang & Co., Advocates and Solicitors, Tower Block, Wisma Yakim, Kota Kinabalu in the following manner:-

   (a) The sum of RINGGIT MALAYSIA ONE MILLION ONLY (RM1,000,000.00) on or before the 18th October 1994;

   (b) the sum of RINGGIT MALAYSIA TWO MILLION ONLY (RM2,000,000.00) by the 1st to the 10th of November 1994;

   (c) The sum of RINGGIT MALAYSIA ONE MILLION ONLY (RM1,000,000.00) by the 1st to the 10th January 1995;

   (d) The sum of RINGGIT MALAYSIA ONE MILLION ONLY (RM1,000,000.00) by the 1st to the 10th of February 1995;

   (e) The balance the settlement sum of RINGGIT MALAYSIA ONE MILLION AND FIVE HUNDRED THOUSAND ONLY (RM1,500,000.00) by the 1st to the 10th March 1995.

2. …

…

…

…

3 (a) Notwithstanding clauses 1(c), (d) and (e) above, the Second Party shall not be required to pay the settlement sums stated therein in the event that the TOL for the 8,000 acres of State Land more or less in the 35,000 acres of timber land is not issued by the relevant authorities.

(b) In the event that the TOL aforesaid is issued at a date later than provided in clause 1(c) (d) and (e) above the manner of payment shall be the same except payment shall commence within one calendar from the date of written notification and production of the TOL to the Second Party. For the purpose of this Clause the payments dates and months under clause 1(d) and (e) shall be adjusted correspondingly.

(c) In the event that the TOL aforesaid is not forthcoming the Second Party shall assign all its right to take actions including the rights to institute legal proceedings against any third parties to preserve the rights of the said company. If the First Party succeeds in obtaining the TOL, payment of the balance of the settlement sum shall be in accordance with cl. 3(b) above.

(d) If the First Party shall fail to obtain the TOL for the 8,000 acres of timber land after exhausting all avenue of appeal to the relevant authorities or actions as the case may be, the Second Party shall not be required to pay any of the settlement sum mentioned under cl. 1(c) (d) and (e) and these payments shall instead be used to set off the lesser area of timber land sold to the Second Party when the latter acquired the said company with the 35,000 acres of timber land. On such happening the parties hereto agree not to claim against one another for whatever reason.

(e) The First Party shall bear all the costs and expenses including the TOL licence fees incurred in respect of the said timber land.

4. …

5. …

6. The First Party and the Second Party HEREBY AGREE that each of the parties hereto release the other of them for all actions, demands, expenses, damages, claims whatsoever at law and equity which either of the parties hereto now have or which they or their successors in title, heirs or personal representatives as the case may be shall or may at any time thereafter have claim or demand whatsoever against the other party for or on account of the terms, stipulations and covenants of the said Sale of Shares Agreement and Supplementary Agreement or any breach or default already committed or made by reason of any act, matter or thing in anywise relating thereto down to and inclusive of the date of this deed.

Arising from the deed further payments were made to and admitted by the plaintiffs either by way of deductions or outright payments which came up to RM2,075,005.41 out of the RM6.5 million as agreed under the deed leaving the balance of RM4,423,994.59. However the defendants dispute the total sums paid. As per para. 22 of the defendants' 1st affidavit it is alleged that there

should be included another RM1,000,000 which sum was paid to one Mr. Ng Kok Lip of K&N Kenanga Sdn. Bhd. "for the account of the 1st plaintiff and this was done on the instructions of the plaintiffs on 15 November 1994 ..." Hence the defendants say that the actual balance left should be RM3,423,994.59. This averment of the defendants appears to have not been rebutted by the plaintiffs when they stated in the plaintiffs' 1st affidavit thus:

> 10. That in reply to paragraphs 18, 19, 22 and 24 of Loi's affidavit, the Plaintiff says that the 1st Defendant being the person who controls and directs the 4th, 5th, 7th and 8th Defendants cannot hide behind the veil of incorporation of the 4th or 5th Defendant Companies in order to avoid his personal liability for the debts formally incurred by the 4th Defendant especially when he had wrongfully caused the transfer of the assets of the 4th Defendant (which comprised substantially of the shares in the Concessionaire Company) to his nominees.

In any event, there were also exchanges of correspondences between the solicitors of the plaintiffs, Messrs JNLS Associates and Messrs Alex Pang & Co., acting for the purchaser, Goodwill Prosperity Sdn. Bhd. One undated letter from JNLS Associates ("LLK33" of the defendants' 1st affidavit) was basically giving instructions on the deductions to be made from the sum due to the plaintiffs. But a letter from Messrs Alex Pang & Co. dated 10 August 1995 to Messrs JNLS Associates complained on the undue delay in obtaining a Temporary Occupation Licence (TOL) for the area of 8,000 acres within the said timber concession ("LLK31" of the defendants' 1st affidavit). It also disclosed that illegal logging was discovered in the same area. There is also another letter from JNLS Associates dated 29 March 1996 addressed to the Setiausaha Hasil Bumi ("LLK30" of the defendants' 1st affidavit) entitled "Re: TOL for 8,000 Acres State Land Under Licence No. JP(NNN) 047/93(SP) Dapu Raya Sdn. Bhd." That letter stated, *inter alia*, that "the responsibility to secure the TOL for the 8,000 acres State Land under the above mentioned Licence vested on Mr. Chong Nyuk Fung @ Chong Nyuk Kiong and all costs and expense incurred thereon shall be borne by him."

Obviously matters were not settled between the parties since by a letter dated 3 February 1997 addressed to the 1st defendant, Mr. Loi Lung Kiong, ("LLK34" of the defendants' 1st affidavit) the plaintiffs gave a 48 hours notice for the payment of RM4,423,994.59. A draft statement of claim was also enclosed with a caution that it would be served if the demand was not met.

The Statement Of Claim

The plaintiffs filed their writ of summons together with the statement of claim on 4 February 1997 thereby indicating failure to get any response to their solicitor's letter of 3 February 1997. The first eleven paragraphs of the statement of claim describe the parties to the action. Paragraph 12 makes a reference to the approval dated 15 August 1991 of the said timber concession to the 3rd defendant, Dapu Raya Sdn. Bhd. Such averment is of course incorrect as the approval was given to Jadi Sabah Sdn. Bhd.

From para. 13 to 19, in summary, cover the assertions of:

(i) negotiation for the disposal of shares;

(ii) the alleged oral agreement prior to the execution of the sale of shares agreement;

(iii) the execution of the sales of shares agreement with an allegation that it was undated then;

(iv) the re-negotiation after the issuance of the timber extraction licence which the plaintiffs stated to cover only 30,000 acres with the balance of 5,000 acres of the said timber concession to be separately considered;

(v) the execution of the supplementary agreement which again the plaintiffs alleged to have been back-dated from 28 December 1993 to 10 December 1993; and

(vi) finally para. 19 alleges disputes arising even after the execution of the supplementary agreement.

Here, I pause to note that the plaintiffs seem to consider as vital what were discussed prior to the execution of the sale of shares agreement. But it is trite law that matters covered in the course of a negotiation are generally to be excluded in the construction of a written contract. In *Prenn v. Simmonds* [1971] 3 All ER 237 at p. 240, Lord Wilberforce said this:

> In my opinion, then, evidence of negotiations, or of the parties' intentions, and a *fortiori* of Dr. Simmonds' intention, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the aim of the transaction.

And this principle has been accepted in our courts. (See: *Tan Ah Chim & Sons Sdn. Bhd. v. Ooi Bee Tat & Anor*. [1993] 3 MLJ 633; *Kam Mah Theatre Sdn Bhd v. Tan Loy Soon* [1994] 1 MLJ 108).

To revert, paras 20 to 23 deal with:

(i) the execution of the deed;

(ii) its relevant terms;

(iii) the assertion of an implied term thereof; and

(iv) the breaches of such alleged implied term.

As for para. 24 it refers to illegal logging activities in the 8,000 acres of the said timber concession attributed to the 1st and 6th defendants. And para. 25 pleads that the 1st, 4th and 6th defendants are estopped from relying on cls. 3(a) and (b) of the deed in view of the alleged breaches, the illegal logging and the acquisition of the said timber concession by the 5th defendant.

Next, para. 26 blames the 1st and 4th defendant for not settling the sum of RM4,423,994.59 and asserting such failure to be a breach of the deed.

Thereafter, para. 27 alleges that the 2nd, 3rd, 4th and 5th defendants were the agents and nominees of the 1st defendant and asserts that they were traded and directed by the 1st defendant for his own benefit. A long list of particulars is included alleging how the 1st defendant controlled those defendants. And para. 28 alleges conspiracy amongst 1st, 6th, 7th, 8th and 9th defendants to dissipate the assets of the 4th defendant to the prejudice of its creditors including the plaintiffs. Particulars are given alleging such conspiracy.

Paragraphs 29 to 31 allege fraudulent transactions on the part of the 1st defendant or alternatively the 6th defendant through the 1st defendant and the other defendants as well to the prejudice of the plaintiffs. Particulars of the alleged fraudulent transactions are also given.

Finally, para. 32 states:

> Despite repeated demands the 1st Defendant had failed and refused to pay to the Plaintiffs the said debt which is due and owing.

As for the prayers sought for, *inter alia*, they range from orders to the 1st, 2nd, 6th and 9th defendants to produce or make available books, minutes, files, resolutions, etc. to an order enabling the plaintiffs' representatives to do inspection in the 1st and 6th defendants' premises. There is also a prayer for payment of the alleged debt by the 1st defendant personally or jointly or severally with the 7th, 8th and 9th defendants or by the 6th defendant. A declaration is also sought for to say that the acquisition of the shares of the 3rd defendant by the 5th defendant is void.

The Grounds Of The Application

In their application the defendants summarised their grounds as follows:

(i) that the Plaintiffs' cause of action (if any) would be based on solely on the Deed of Settlement dated 18/10/93 (the said Deed of Settlement) entered into between the Plaintiffs and the 4th Defendant;

(ii) as the other defendants (except the 4th Defendant) are not parties to the said Deed of Settlement, the Plaintiffs' claim against the other Defendants has been wrongfully brought;

(iii) the action against the 4th defendant is not sustainable by reason of clauses 3 (a) and 3 (d) of the said Deed of Settlement; and

(iv) the Plaintiffs have no standing to bring an action for any losses (which is denied) that was alleged to have been suffered by the 4th Defendant.

Now, as regards item (a) of O. 18 r. 19 of RHC, it is settled law that it involves no affidavit evidence to consider it. (See: para. 2 of r. 19; *Golden Century Development Sdn Bhd v. Gan Hoe* [1983] 1 MLJ 86). But in the instant case I note that, *inter alia*, para. 6, 16 and 26 of the defendants' 1st affidavit purport to invoke item (a). I propose therefore to ignore such an assertion.

Contentions Of The Parties

In submitting that this action of the plaintiffs should be struck out learned counsel for the defendants basically contended that this action should be viewed as confined to the deed. And as the terms therein are clear he says that there should be no question of implied terms being invoked.

Further and more relevant to the other defendants except the 4th defendants, learned counsel argued that there was no privity of contract as between them and the plaintiffs as regards the deed. The idea of lifting the veil of incorporation was also rejected outright by learned counsel. He said that mere control of a company is not enough to constitute a 'façade'. To him there should be the involvement of a more deliberate concealment of both the identity and the activities of the person behind the company as for instance where the company is used as a vehicle to commit fraud.

As regards the 4th defendant, learned counsel said that the deed clearly stipulated the event when payment would be withheld. In this case it was contended that since the plaintiffs failed to secure TOL for the 8,000 acres and was therefore in breach of the terms of the deed the 4th defendant should be discharged from any further liability as stated therein.

In respect of the other allegations in the statement of claim, learned counsel argued that they were raised for the "purpose of pressuring the 1st defendant and the 6th defendant into settling the plaintiffs claim." And he highlighted the letter dated 3 February 1997 ("LLK34" of defendants' 1st affidavit). Learned counsel also pointed out that whatever losses the 4th defendant might have suffered was of no concern to the plaintiffs. Hence, he concluded that this is a plain and obvious case which should be struck out.

On the other hand, learned counsel for the plaintiffs admitted that the plaintiffs' claim against "all the defendants is for balance of monies due to them from the sale of all their shares in the 3rd defendant company." It was further admitted that the plaintiffs sold their shares to the 4th defendant and there "remains a balance of RM4,423,994 due and owing to the plaintiffs." But learned counsel contended that there are triable issues requiring a full trial of this action. He submitted that the asset of the 4th defendant was the shares in the 3rd defendant which had since been subject to a series of transactions instrumented by the other defendants in particular, the 1st defendant.

As regards the question of privity of contract learned counsel advocated the adoption of the doctrine of lifting the veil of incorporation. He said that it should be done in this case as:

(i) the 4th defendant was a mere puppet of the 1st defendant;

(ii) the 1st defendant has been its alter ego;

(iii) that it was being used to evade the contractual obligations of the 1st defendant;

(iv) that the 4th defendant was a mere agent of the 1st defendant; and

(v) by virtue of ss. 304(1) and 304(2) of the Companies Act 1965.

Learned counsel also added that the negotiation and the oral agreement as pleaded are the other reasons to invoke the doctrine.

It was also submitted at length that the 1st defendant controlled and/or conspired with the other defendants and thus provide another reason for the lifting of the veil.

And learned counsel disputed that the claim of the plaintiffs is solely based on the deed. He pointed out that the other bases are:

(a) oral agreement;

(b) debt; and

(c) conspiracy.

In respect of the allegation of breaches of the implied term of the deed which is more relevant to the 4th defendant, learned counsel argued that the plaintiffs had undertaken their best endeavour but the defendants did not. And he complained that the defendants were responsible in the inability of the plaintiffs to get the TOL. Hence, he contended that the defendants should now be estopped from relying on the non-performance by the plaintiffs.

It was also submitted that the defendants failed to answer specifically some of the allegations made by the plaintiffs other than stating that they were irrelevant. To learned counsel this constitutes a triable issue.

There was also an allegation that the 4th defendant had practically nothing to begin with. Thus, the purchase price was paid by the 1st and the 6th defendants. Obviously learned counsel was trying to show that *de facto* it was the 1st defendant who was purchasing the shares of the 3rd defendants from the plaintiffs. He even alleged that the transfer documents were pre-signed and undated.

Findings

(i) The Relevant Law

It is settled law that it is only in plain and obvious case that the exercise of the power to strike out an action is justified. (See: *Drummond-Jackson v. British Medical Association* [1970] 1 All ER 1094; *Lee Nyen Choi v. Voon Noon* [1979] 2 MLJ 28; *Tio Chee Hing & Ors v. Government of Sabah* [1981] 1 MLJ 207; *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1 PC).

It has also been held that it is a triable issue if it involves a complex question of law requiring mature consideration: *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Rakyat* [1979] 1 MLJ 23.

But in *Raja Zainal Abidin bin Raja Haji Tachik & 3 Ors v. British-American Life and General Insurance Bhd* [1993] 3 CLJ 606, his Lordship Peh Swee Chin SCJ (now FCJ) said this, at p. 611:

> It is to be remembered that the High Court always has an inherent Jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.
>
> ...
>
> ...

> ... The lower Court should have also scrutinized the evidence in order to decide whether the action was bound to fail. If so, it would have been found otiose to send the case back to its starting point to start its long and expensive course *albeit* such a conclusion was reached on an application filed under O. 18 r. 19.

Having said the foregoings, his Lordship also said this, at p. 612:

> We must emphasize that for any Court to reach such a similar decision on an application under O. 18 r. 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

In *Tractors Malaysia Bhd's case (supra)* Lord Diplock outlined the approach that should be taken in an application to strike out an action when he said this, at p. 1:

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the Statement of Claim alone, their Lordships would have been loth to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the Statement of Claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the New Action could not possibly succeed.

And further down, at p. 3, he continued:

> ... Their Lordship do not doubt that the Federal Court, but for the fact that it mistakenly considered that it was precluded from examining the evidence, would have come to the same conclusion.

The Court of Appeal in *Pengiran Othman Shah bin Pengiran Mohd Yusoff v. Karambunai Resorts Sdn Bhd* [1996] 1 MLJ 309 also took a similar approach in considering the striking out application before it. YA Siti Norma Yaakob JCA, delivering judgment for the court, said this at p. 320-321:

> The discretionary power to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff together from pursuing his claim. (See *Tractors (M) Bhd v. Tio Chee Hing* [1975] 2 MLJ 1.) Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case,

> but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *Mckay & Anor v. Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890.)
>
> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400.) Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

I have already dealt with the legal position of matters discussed during a negotiation stage.

As to the exercise of discretion in lifting a corporate veil there are several 'exceptions' to the principle established in *Salomon v. Salomon & Co Ltd* [1897] AC 22. In England some are based on the provisions of the Companies Act of that country. But such discretion may also be exercised where it is apparent that a company is used as a device to mask the carrying out of a business which a person could not do personally as in *Gilford Motor Co. Ltd v. Horne* [1933] Ch 935. Or where a person, in order to avoid his contractual obligation, sells the subject property to a company controlled by him as in *Jones v. Lipman* [1962] 1 WLR 832. A corporate veil may also be lifted where the relationship between two companies is that of holding company and subsidiary. This is particularly relevant when group accounts is involved. And of course, where taxation or fraudulent trading is in issue, the lifting of corporate veil may also be done.

The apex court of this country had given some guidelines on the exercise of discretion to lift a corporate veil. In *Aspatra Sdn Bhd & 21 Ors v. Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97, his Lordship Mohamed Azmi SCJ (now FCJ) had this to say, at p. 103:

> The court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved although the consequences of lifting the veil would vary according to the circumstances of each case.

In that case the exercise of discretion by the judge of the first instance was sustained as "there was admittedly an element of fraud in the receipt of the secret profits whatever might be the capacity in which Lorrain had received them."

However, in *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd* [1996] 3 MLJ 533 the doctrine was not adopted. In stating the reason, his Lordship Chong Siew Fai CJ (Sabah and Sarawak) at p. 542-543 said:

> In the course of arguments, the question of 'lifting the corporate veil' which was widely canvassed in the court below was again raised. With respect, we did not see the necessity of invoking the doctrine in the particular facts and circumstances of the present case. Peeping behind the veil is to enable the court to obtain information on certain features of the company, for example, its composition, type (holding, subsidiary etc), proportion of shareholdings, control etc. Having obtained this information, the court will examine it and then decide whether to adjudicate on the company alone or to move up the ladder of lifting the veil, to more serious repercussions. In our instant case, it was an undisputed fact that the subsidiary was wholly-owned by the holding company, and it had not been challenged that the holding company, by proxy – through its nominees – managed the subsidiary. Thus, the composition, type, shareholding and control of the subsidiary stood in front of the veil, and there was no need to lift the veil to unveil them.

Nevertheless, the court endorsed the principle that in cases where "there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies."

In respect of the principle of privity of contract one has only to revert to the basic. In *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1914-15] All ER 333 Viscount Haldane, L.C. at p. 334 had this to say:

> In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract is personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.

And the above case, in particular the first preposition, was referred to in *Emar Sdn Bhd v. Aidigi Sdn Bhd SC* [1992] 2 MLJ 734.

On the application of the implied term principle in a contract, I should begin by referring to the case of *Yong Ung Kai v. Enting* [1965] 2 MLJ 98 where McGilligan J adopted the "Oh, of course" test propounded in *Shirlaw v. Southern Foundries (1928) Limited* [1938] 2 KB 227.

Subsequent cases took a similar approach with some variations, in particular, in order to give business efficacy. But Lord Denning M.R. in *Shell U.K. v. Lostock* [1976] 1 WLR 1187 listed two broad categories of implied terms, whereby the first category "comprehends all those relationships which are of common occurrence. Such as the relationship of seller and buyer, owner and hirer, master and servant, landlord and tenant, carrier by land or by sea, contractor for building works, and so forth. In all those relationships the courts have imposed obligations on one party or the other, saying they are 'implied terms'. "These obligations are not founded on the intention of the parties, actual or presumed, but on more general considerations."

The second category, Lord Denning described it as "those cases which are not within the first category. These are cases – not of common occurrence – in which from the particular circumstances a term is to be implied. In these case the implication is based on an intention imputed to the parties from their actual circumstances ... Such an imputation is only to be made when it is necessary to imply a term to give efficacy to the contract and make it a workable agreement in such manner as the parties would clearly have done if they had applied their mind to the contingency which has arisen. These are the "officious by-stander" types of case ... In such cases a term is not to be implied on the ground that it would be reasonable: but only when it is necessary and can be formulated with a sufficient degree of precision."

Whilst I consider the above dictum of Lord Denning M.R. as highly persuasive, I must take note of the recent approach by our courts on this issue. In any event I do not think the first category has any relevance to this instant case as it is not a common occurrence for contracting parties to subsequently enter into a settlement deed similar to the deed hereto.

In *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 Chong Siew Fai J (as he then was) said this, at p. 257:

> It is not for the courts to imply covenants or stipulations which might and ought to have been expressed if intended. ...
>
> ...
>
> ...

> Generally speaking, parties to a contract are taken to have incorporated therein all terms and conditions which they wanted. And, where an agreement already contains terms for termination, during the currency of the agreement, the onus lies on the person (the plaintiff in our instant case) who contends that a further such term ought to be implied, and it will be difficult in such situation to imply further such term.

And further down, at p. 258, his Lordship continued:

> In other words a term cannot be implied unless the parties must necessarily have intended it such that both would have answered, 'Oh of course,' to an officious bystander had he suggested it in negotiation.
>
> ...
>
> ...
>
> Thus, for a term to be implied in a contract, it must be both necessary to give business efficacy to the contract and obvious.

I fully concur with his Lordship's restatement of the law which has been duly referred to by the Court of Appeal without any qualification in the case of *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587 CA). After all it is not the function of the court to improve the terms of a contract negotiated although it may endeavour to uphold a bargain as much as it possibly can. (See: *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1996] 3 MLJ 327 FC).

(ii) The Application Of The Defendants ("The Other Defendants") Except The 4th Defendants

There is no dispute that none of the other defendants is a party to the deed, the sale of shares agreement or the supplementary agreement. It is also obvious from the statement of claim that the primary object of this action is to secure the balance of the sum allegedly due under the deed. But the plaintiffs say that inspite of the parties to the deed, the other defendants should be liable to meet the payment. And their grounds of saying so have been summarised hereinabove.

Having considered the diverse contentions of the parties I am unable to agree that there is any basis for the other defendants to have been properly made parties to this present action. In my view the basic foundation of the plaintiffs' case is the deed contrary to the assertion of their learned counsel. In fact their claim is nothing more than for the balance of the consideration agreed under the deed. Thus, the proper party to demand payment from should be the other party to the deed, namely, the 4th defendant. The other defendants, not being privy to the deed, should not find themselves entangled in the claim of the

plaintiffs who, by now, must have realised that they should have ensured the payment through other means such as a personal guarantee from the directors of the 4th defendant or other persons of means. Hence, by reason of absence of privity of contract alone that I should allow this other defendants' application.

And I am not prepared to exercise my discretion to pierce the veil of incorporation. I find that the undisputed facts and circumstances of this case do not warrant such an undertaking. They do not come anywhere near to those situations such as in the *Aspatra Sdn Bhd's case (supra).* This is not a case of where the 4th defendant was just a façade or a mask of the other defendants in order to secure an undue advantage over the plaintiffs. The plaintiffs executed the deed not without the advantage of having a solicitor to advise them. That is not in dispute. And it is not averred that the plaintiffs are mere country yokels. It was also not explained why they were unable to better secure the payment from the 4th defendant when the deed was signed. And if at all there was any understanding that the liability of the 4th defendant would be guaranteed or undertaken by any of the other defendants, in particular, the 1st defendant, the deed is silent. Further, there is no documentary proof submitted to indicate the existence of such an understanding. Learned counsel for the plaintiffs argued that there was an oral agreement in the course of the negotiation. With respect, the law as stated hereinabove precludes me from considering such an alleged oral agreement simply because the deed should now speak for itself.

As for the averment that the 1st defendant controlled the other defendants, conspired with them and acted fraudulently to deprive the plaintiffs of payment from the 4th defendant and thus justifying the lifting of the corporate veil, I think it is an ingenious way of trying to lay the blame on others for their own previous ill-advised judgment. In fact I am inclined to agree with the learned counsel for the defendants that these averments were raised in order to pressure the other defendants, in particular, the 1st and 6th defendants to meet the payment. I think the plaintiffs know the delicate position of the 6th defendant being a public-listed company. For instance, it is no business of the plaintiffs to complain that the other defendants, in particular the 6th defendant, have infringed the provisions of the Companies Act 1965. Neither is it the affairs of the plaintiffs to highlight on the methods adopted by the 1st defendant in dealing with his companies. The only interest of the plaintiffs is to get payment from the 4th defendant, a company having its own legal entity. Further, on the allegation of conspiracy to prevent the procument of TOL, the provisions of the deed, in particular, cls. 3(d) and (e) are very clear. And that has been reinforced by "LLK-30" of the defendants' 1st affidavit. There is therefore no question of estoppel arising. Similarly, the issue of implied terms does not arise as will be further discussed hereinbelow. Accordingly, the other

defendants have appropriately considered those averments as well as the other contentions which I may have not specifically dealt with herein as irrelevant thereby not deserving any specific rebuttal.

For the above reasons I have therefore no hesitation to find that the claim against the other defendants is plainly and obviously unsustainable. It is scandalous, frivolous and vexatious and definitely an abuse of the process of the court. In short, there is no triable issue which warrants the claim against them to proceed. I should hasten to add that in this case there is hardly any allegation of the facts being complex. And rightly so as the primary object of the plaintiffs is for payment of the balance sum allegedly due under the deed. As for the legal issues raised, having deliberated on them and as discussed hereinabove, I do not think they require further consideration. I am satisfied that they are unarguable and unsustainable. And thus to allow the claim to proceed for trial would be an exercise in futility whilst incurring unnecessary costs.

(iii) The Application Of The 4th Defendant

In considering this application I bear in mind the reasons which I have given for the application of the other defendants. And I rule that, if relevant, those reasons and the reasons hereinbelow for this application are applicable herein and *vice-versa.*

To begin, I do not think there is any doubt that the 4th defendant is the proper party being sued. It is the other party to the deed.

However, the 4th defendant is invoking cl. 3, in particular, sub-cls. (a) and (d) of the deed.

Now, there is no dispute that no TOL was secured for the 8,000 acres within the said timber concession. The plaintiffs blame it on the non-co-operation of the defendants by refusing to give a proper authorisation letter and at the same time organising or condoning the illegal logging activity in the area. Their learned counsel also submitted that it should be implied in cl. 3 of the deed that the defendants, in particular the 1st and 4th defendant, should use their best endeavour to obtain the issuance of the TOL. According to him the defendants had breached such a term.

Having carefully considered the relevant clauses I am unable to conclude that the contention of the learned counsel for the plaintiffs has any substance. Clauses 3 (a) and (d) of the deed offer no room for alternate meanings to them. Neither do they indicate the necessity for implied terms to be added to give business efficacy nor obvious so as to justify the “oh, of course” test. Clause 3 (d) provides in clear language that the task of getting TOL falls

squarely upon the plaintiffs. It even provides a solution in the event of failing to get TOL. And that must have been crystal clear in the minds of all parties as indicated by a contemporaneous document in the form of the letter "LLK30" exhibited in the defendants' 1st affidavit. In addition, there is not a single document shown as would have been reasonably expected to rebut promptly the complaint of the 4th defendant through its solicitors as per "LLK31" of the defendants' 1st affidavit which is another contemporaneous document. That is not helpful to the plaintiffs' case. (See: *Wong Hon Leong, David v. Noorazman bin Adnan* [1995] 3 MLJ 283).

Accordingly, I do not think there is any need for implied terms to be read into cls. 3 (a) and (d) of the deed. Hence, the assertion of breaches of implied terms has no basis and no triable issue can be found thereof.

And in view of the provision of cls. 3 (a) of the deed there can be no question of any payment due since no TOL has been obtained. Thus, there is no reason for the plaintiffs to demand payment from the 4th defendant.

As regards the averment that the only asset of the 4th defendant had been depleted, I find that strange as a basis to mount an action not only against the 4th defendant but also the other defendants. In the first place it was agreed in cl. 4.2 of the sale of shares agreement that in purchasing the shares the 4th defendant could have its nominees as the new registered owners. Secondly, the deed by cl. 1 thereof settled all the differences between the plaintiffs and the 4th defendant including any claim under the sale of shares agreement and the supplementary agreement. Thus, as stated earlier the only interest left for the plaintiffs to claim would have been the consideration stated in the deed. And that could only be claimed from the 4th defendant being a privy to the deed. Thirdly, whether the 4th defendant could have met the payment is now an academic question since no TOL has been issued. Hence, the issue of depletion of its asset is irrelevant and a non-starter.

In the final analysis, I find therefore the application of the 4th defendant justified for the reasons hereinabove. I have also considered the other arguments raised but not specifically referred to herein. I do not think they make any difference to my conclusion. The claim of the plaintiffs against the 4th defendant, in my view, is therefore scandalous, frivolous and vexatious. It is also an abuse of the process of the court. In short, it is plain and obvious that it has no chance of success. It should therefore be struck out so as to save time and costs which otherwise would be incurred if it is allowed to go for a full trial.

Conclusion

For the above reasons it is therefore my conclusion that I should allow the application of the other defendants as well as that of the 4th defendant not only pursuant to O. 18 r. 19 items (b) and (d) of the RHC but also under the inherent jurisdiction of this court. In other words, this action of the plaintiffs is hereby struck out with costs to the defendant to be taxed unless agreed.

As postscript, I must say that after having came to my conclusion in this case I could not help but to recall the words of Lord Templeman in *Ashmore v. Corp of Lyoyd's* [1992] 2 All ER 486 at p. 493:

> ... It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination.